INDEX.

Page

Motion for leave to proceed in forma pauperis..... 1

Prayer for relief..... 15

Affidavit of Elbert J. Burns..... 17

Certificate of service..... 21

Cases Cited.

Gardner v. State of Michigan, 199 U. S. 325, 50 Law Ed. 212, 26 Sup. Ct. 106..... 14

Lizzie Stewart v. State of Alabama, 17 So. (2d) 871.. 14

Statutes Cited.

Code of Alabama, Title 15, Sec. 428..... 12

Code of Alabama 1940, Title 62, Secs. 196 to 228, inc. 10, 11, 13, 14

Constitution of Alabama 1901, Sec. 140..... 4

Constitution of the United States, Fourteenth Amendment 2, 3, 4, 13, 14

Judicial Code, Sec. 237-b, as amended by Act of Feb. 13, 1925, 43 Stat. 937..... 4

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

No. .....

ELBERT J. BURNS, Alias E. J. BURNS,
Petitioner,

vs.

STATE OF ALABAMA.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS.

To the Honorable Supreme Court of the United States:

In the above styled cause Petitioner respectfully represents to this Honorable Court the following existing facts and circumstances as a basis for his motion for leave to proceed on this review by Certiorari in forma pauperis, as is provided by law (Act of July 20, 1892, Chap. 290, Sec. 1, 27 St. at L. 252, as amended June 27, 1922, Chap. 246, 42 St. at L. 666, Comp. St., Sec. 1626, Fed. St. Anno. Suppl. 1922, p. 32, 28 U. S. C. A., Sec. 832):

First: Petitioner is a white male citizen of the State of Alabama. Petitioner owns no property of any kind, real, personal or mixed, and has no source of income, has no

money, and is unable to pay, or to give security for the payment of the costs of this proceeding. He was indicted by the Grand Jury of the Tenth Judicial Circuit of Alabama (Jefferson County) on July 6, 1943, charged with the offense of first degree murder. Petitioner was immediately arrested and imprisoned and was arraigned in open court on the 10th day of July, 1943, and entered his pleas "not guilty" and "not guilty by reason of insanity." Petitioner has been continuously incarcerated since that time. Petitioner's wife owns no property. Petitioner's wife was a witness against him in this prosecution and has no inclination arising out of the conjugal relation to aid and assist Petitioner in a pecuniary way. The attached affidavit of petitioner is referred to and it is requested that the same be considered in connection herewith.

Second: **The bona fides of the review here sought.** With the utmost good faith in the basis for a review, does the Petitioner here present his cause. He has been sentenced to death in the electric chair, and, verily a matter of life and death for this Petitioner is here involved, and the proceedings here sought to be instituted are not sought for any dilatory purpose. Petitioner firmly maintains his innocence; however, this is not the sole question to be presented by the petition for the writ of certiorari. In addition to maintaining his innocence the Petitioner contends honestly and in good faith that he was not a man of sound mind at the time of the trial of this case, nor was he a man of sound mind at the time of the alleged commission of the offense for which he has been sentenced to death, and that he was denied due process of law as guaranteed to him by the Fourteenth Amendment to the Federal Constitution in connection with the denial of his motion for an examination into his sanity pursuant to the Statutes of Alabama in such cases made and provided, in that the denial of said motion was an abuse of the dis-

cretion of the trial judge and was admittedly made upon uncommunicated facts within the alleged knowledge of the trial judge and not upon the basis of any evidence presented to the trial judge at the time his motion for such examination into his sanity was considered and determined; and, furthermore, Petitioner contends honestly and in good faith that he has been denied due process of law as guaranteed to him by the Fourteenth Amendment to the Federal Constitution, in that he did not receive that fair and impartial trial which is the essence of due process of law, and on account of the innumerable rulings of the trial court, injurious and prejudicial to an unbiased and impartial trial, and adhered to by him, some of which rulings were discretionary, but in the instant case amounted to an abuse of discretion, and some of which rulings were actually an invasion of his legal rights, such as commenting upon the failure of the defendant to take the witness stand, and the particular comment by the trial judge himself in the presence of the jury as to whether the defendant would take the witness stand.

Furthermore, he contends that he was denied due process of law in that he was denied the right to the benefits of the General Laws of the State of Alabama with reference to drawing, summonsing, impanelling and selection of a jury to try his case, or, in the alternative, was denied the equal protection of the law of the State of Alabama, as guaranteed to him by the 14th Amendment to the Federal Constitution in this respect. Furthermore, he contends that the arbitrary ruling of the Supreme Court of Alabama holding that, notwithstanding the express terms of the the Constitution of the State of Alabama, the Legislature of Alabama made and enacted a local law without a compliance with the constitutional limitations upon the power of the Legislature of Alabama to enact local legislation, was an arbitrary ruling, contrary to the express terms of the Constitution, contrary to the organic law of the State of

Alabama, founded on no sound judicial reason, and amounted to a condonation on the part of the Supreme Court of Alabama of a tyrannical exercise of power by the Legislature of Alabama in defiance of the organic law of the State of Alabama, and was tantamount to an abandonment of a Republican form of Government and infringed upon the right of the people of the State of Alabama, and this petitioner, in particular, to be governed by a representative form of Government under and pursuant to the organic law of the State of Alabama, ordered by the people of Alabama acting through their duly chosen representatives and at the polls, thus infringing upon the guarantee contained in Section 4, Article IV, of the Constitution of the United States, viz., "**The United States shall guarantee to every State in the Union a Republican form of Government.**" And your Petitioner further says that without the above and foregoing infringements of his rights during the course of the trial he would not have been convicted and sentenced to death. And your Petitioner says that the Federal questions hereinbefore presented were presented to the Supreme Court of Alabama and adversely decided.

Third: **The jurisdictional basis for this review is stated as follows:**

(1) The statutory provisions sustaining the jurisdiction is contained in Judicial Code, Sec. 237-b, as amended by Act of February 13, 1925, 43 Stat. 937.

(2) The writ is properly addressed to the Supreme Court of Alabama, that being the court of last resort in the State of Alabama. Const. of Ala. 1901, Sec. 140.

(3) The decision and judgment sought to be reviewed was rendered by the Supreme Court of Alabama on the 15th day of June, 1944. (Rec. Sup. Ct. of Ala., p. 883 et seq.). Application to the Supreme Court of Alabama for

a rehearing was duly and timely filed and was denied by the Supreme Court of Alabama on the 2nd day of November, 1944 (Rec. Sup. Ct. of Ala., p. 905 et seq.). Thus this motion for Leave to Proceed in Forma Pauperis is timely presented.

(4) The date for the execution of the sentence to death of this Petitioner is set for the 12th day of January, 1945, and Executive Reprieve until February 16th, 1945, has been granted by the Governor of Alabama.

Fourth: **The facts upon which this review is sought are briefly stated as follows:**

Petitioner was indicted by the Grand Jury of the Tenth Judicial Circuit of Alabama (Jefferson County), on July 6th, 1943, for first degree murder in the death of one Jake Prescott, which indictment consisted of five counts (Rec. p. 1), said indictment filed in open court, and on July 6th, 1943, an order was made and entered by Honorable Geo. Lewis Bailes, one of the Judges of said Court, denying to the petitioner (defendant) the right of bail.

Petitioner made and filed a motion to quash the indictment (Rec. p. 11), which motion was by the trial court overruled (Rec. p. 19).

Petitioner (defendant) was arraigned on said indictment in open court on July 10th, 1943, and entered a plea to said indictment of "not guilty," and "not guilty by reason of insanity."

The cause was set for trial before Honorable John C. Morrow, one of the Judges, Criminal Division, of said Court, for July 19th, 1943. The case was the only case set for trial in said court for the week of July 19, 1943, in which a jury was necessary.

On June 29, 1943, Honorable J. Russell McElroy, Presiding Judge of said Court, drew a venire of 150 persons to appear in said Court on July 19, 1943, and ordered the

Sheriff of said County to summons the said named persons drawn from the jury service in the case of State of Alabama v. Elbert J. Burns, alias E. J. Burns (Rec. pp. 104-7).

This alleged order drawing the venire was not made nor filed in office of the Clerk of the Court, nor entered upon the minutes of the Court before the indictment was returned, nor before the jury was selected and sworn in to try this petitioner (Rec. pp. 104, 105, 107).

Petitioner (defendant) made and filed in open court a motion for an examination as to his sanity (Rec. p. 91½), which motion was overruled and denied by the trial court (Rec. p. 91).

Jurors for service in the Circuit Court of Jefferson County, Alabama, report to what is known as the "jury assembly room," in said court house, which is separate and apart from the court rooms. From the last Saturday in June of each year to the first Monday in October of each year, no cases are set for trial in the Circuit Court of Jefferson County, Alabama, in which a jury is required, and usually only one Judge is on duty.

Robert J. Foster, Chief Clerk to the Clerk of the Tenth Judicial Circuit of Alabama, called as a witness, being duly sworn, testified as follows:

> "Q. (By Mr. Alford): Mr. Foster, in what capacity were you employed in the office of the Clerk of the Circuit Court?
>
> A. Chief Clerk.
>
> Q. How long have you been such?
>
> A. About ten years.
>
> Q. What are your duties as Chief Clerk?
>
> A. General supervision of the office.
>
> Q. You have supervision over the minute entries of the court?
>
> A. Yes, sir.
>
> Q. Does the minute entry of the court show any order signed by any judge of the court for the draw-

ing of a jury on June 29th, to be summoned to appear and serve as jurors in the Circuit Court for the week beginning July 19, 1943?

A. Nothing further than what Judge McElroy testified to, as to this paper which he read (Exhibit No. 1).

Q. That was not copied on the records, and it does not show that it was filed in court, does it?

A. No, sir.

Q. Are you present when the jurors' names are drawn from the general jury box of this county?

A. Yes, sir.

Q. That is part of your duties?

A. Yes, sir. Either Mr. Andrews or myself.

Q. Well, since June 29th, do you of your own personal knowledge know whether there has been any additional number of jurors' names drawn from the box to serve as a special venire beginning say July 26th, 1943?

A. No, sir; there has been none drawn. This was the last that was drawn.

Q. Does that document there show how many were drawn?

A. 150.

Q. Was a copy of that jury list that was drawn on July 29th at any time thereafter served on Elbert J. Burns, the defendant here about to enter on this trial?

A. Not out of our office, no, sir.

The Court: Mr. Alford, you mean a copy of the venire?

Mr. Alford: Yes, sir.

The Court: Why not just admit that it was not?

Mr. Hawkins: We will do that.

Mr. Alford: All right; if you admit it won't put it into the record.

Q. When was a list of those jurors made available to this defendant or his counsel?

A. Well, it would not be available to anybody until this morning after the jury was organized.

Q. Then the defendant had not had a copy of that

jury list served on him until this morning when it became available to the general public?

A. I do not know that a copy was served on him this morning, but that was the first time it was available to anybody to see.

Q. That list, which is now available, does not contain the names of all the jurors whose names were drawn to serve as jurors beginning this morning in this court, does it?

A. No, sir; it does not.

Q. Do you know of your own knowledge how many jurors the list contained?

A. There was 150 summonsed.

Q. How many answered present, if you know?

A. About 62 I think there was.

Q. What was the returns or service on the remainder?

Mr. Hawkins: We object.

The Court: Overruled.

A. There was some not found, and some executed.

Q. Do you know how many were reported not found?

A. I think 33.

Q. How was the service, if you know, undertaken by the sheriff on those jurors?

A. The sheriff does that. We have no knowledge of that. He can either serve them personally or serve them through the post office.

Q. That is under a local act of this county as you understand it?

A. Yes, sir.

Q. Do you know how many of those remaining jurors were excused by the court?

A. No. You take 150, and take 33 out, and I think we had 62 others that answered, and then the judge excused 12 in the court room this morning.

Q. Where did the organization of this jury take place, in this room or where?

A. Room 604, the jury room.

Q. What is the number of this room in which you are testifying now?

A. 617.

Q. The jury room then is about a block from this court room?

A. It is at the end of the hall.

Q. The organization of the jury did not take place in the room where you are now testifying?

A. No, sir.

The Court: Suppose we refer this document, which Judge McElroy read, as State's Exhibit 'A.' (Document so marked.)

The Court: You say there is no endorsement on that paper, showing it was filed?

The Witness: No.

The Court: I will ask if it was filed by the office of the clerk of the court?

The Witness: After Judge McElroy drew those 150 names, we sent copies to the sheriff for them to be served, and they were then wrapped up in that wrapper and locked up in the safe and not opened until this morning when I entered this court room. The cards were wrapped up, and they were locked up in the safe, cards wrapped up and not opened until this morning.

The Court: And now in possession of the Clerk?

The Witness: Yes, sir; since they were drawn on the 29th of June.

Q. They were not entered on the minute entry before they were locked up?

A. No, sir.

Q. And have not been as yet?

A. No, sir.

The Court: Anything else, Mr. Alford?

Mr. Alford: I want to show by the sheriff's office that it is their custom to summons jurors through the United States registered mails in this county, and that when a card is returned by the post office department not found they make the return not found, that they do not make any effort thereafter to locate the jurors.

The Court: Well, if you want any one from the sheriff's office we will get them for you.

Q. Mr. Foster, this morning, as you related, when the jury was organized around in Room 604, and cer-

tain jurors were excused by the court from service this week, was the defendant or his counsel present at that time?

A. No, sir" (Rec. pp. 104-7, incl.).

* * * * * * *

In Jefferson County, the mode of empanelling juries for jury trials is the system prescribed by the Jefferson County jury law, Title 62, Sections 135 et seq., Code of Alabama, 1940.

On the morning of July 19th, 1943, which was Monday of that particular week, the trial Judge, Honorable John C. Morrow, entered the jury assembly room, when neither the defendant nor his counsel was present (defendant being confined in jail), examined the jurors present as to their qualifications for jury service and exemptions from jury duty, and selected from those present 24 men who were then sent to the court room, and from which the State and defendant were required to strike a jury, in the case of State of Alabama v. Elbert J. Burns, alias E. J. Burns.

Petitioner (defendant) made and filed a motion to quash the venire (Rec. pp. 3, 4), consisting of 16 grounds, raising the question of the constitutionality of the Jefferson County jury law **(Secs. 196 to 228, incl., Title 62, Code of Alabama, 1940)**. Two of the grounds—15 and 16—raising the question that said Jefferson County jury law **(Secs. 196 through 228, Title 62, Code of Alabama, 1940)**, is repugnant to the Constitution of the United States, which motion was overruled and denied, defendant reserving an exception to the ruling of the trial court (Rec. p. 6).

Petitioner (defendant) then objected to striking from the venire of 24 men, selected by the trial judge, which objection was overruled, and defendant reserved an exception (Rec. p. 116).

Petitioner (defendant) was tried before a jury of 12 jurors taken from the 24 jurors selected by the trial judge at a time and place when neither the defendant nor his counsel was present, which resulted in a verdict of conviction, the penalty being fixed at death. Sentence being pronounced against the defendant and judgment entered (Rec. pp. 6, 7), fixing the punishment at death.

The jury before whom this defendant was tried was secured pursuant to the provisions of Title 62, Article 18, subdivisions 5 and 6, of the Code of Alabama of 1940, the pertinent sections of Article 18, Title 62, Code of Alabama of 1940, appear as Appendix "A" to the Brief and Argument in support of petition for writ of certiorari, filed in this Court at this time.

It is the contention of the petitioner that Article 18, Title 62, Code of Alabama of 1940, is a local law, since it is specifically declared to be a law applicable in its provisions only to Jefferson County, Alabama, and that the Legislature tyrannically assumed the power denied to them by the Constitution of Alabama in the enactment of a local law without complying with the constitutional provisions with reference thereto. The pertinent sections of the Constitution of Alabama of 1901 appear as Appendix "B" to Brief and Argument in support of petition for Writ of Certiorari filed in this Court at this time.

The matter with which the local jury law of Jefferson County, Alabama, deals, was provided for by the general law of the State of Alabama, being Title 30 of the Code of Alabama, the pertinent sections of which title appear as Appendix "C" to Brief and Argument in support of Petition for Writ of Certiorari filed in this Court at this time.

It is the further contention of this Petitioner that the local law is discriminatory and violative of the equal rights clause of the Constitution of the United States, in

that it discriminates against persons who happen to be tried in Jefferson County, Alabama, in capital cases without any reasonable basis for discrimination and is violative of the due process clause of the 14th Amendment, in that, among other reasons, it forces a defendant to trial upon a capital charge before a jury which is not fairly and impartially selected according to the course of law and affords full opportunity for a jury to be "hand-picked" against a defendant.

Before entering upon the trial, and at the time of the arraignment on July 10th, 1943, the attorney for petitioner and the sister of this petitioner, acting as next friend of petitioner, filed a sworn motion, setting out in great detail facts which they deemed sufficient to require the Court to examine into the sanity of the defendant, before requiring the defendant to plead (Rec. pp. 91½, 92½). This motion, or affidavit, claimed the protection accorded by Title 15, Section 428, Code of Alabama 1940. The Court refused to consider this petition. The Court justified its refusal to consider this petition, or application (by whatever name it may be called), by making the following statement:

> "I have known him for 25 years. There is no use on earth for me to institute an inquiry as to his sanity, and I refuse to do it" (Rec. p. 92).
>
> "I might state that I have known the defendant for many, many years, and there is no reason on earth, occurring to me, why I should delay the trial of this case and inquire into his sanity" (Rec. p. 93).

Thereafter, upon arraignment, defendant, and counsel for defendant, stood mute, and the Court entered a plea for the defendant of "not guilty" (Rec. p. 94).

The case went to the jury on the indictment and the single plea of "not guilty" interposed by the Court for the defendant (Rec. p. 871).

Therefore, the proceedings hereinbefore referred to, with reference to the selection of the jury and the trial, began on July 19th, 1943.

During the course of the trial, in violation of the express terms of the Alabama statute, the trial court, in the presence of the jury, commented on whether or not counsel would put the defendant on the witness stand to testify in his own behalf (Rec. p. 778).

Petitioner (defendant) made and filed in said cause a motion to set aside the judgment and grant to the defendant a new trial (Rec. pp. 19 to 40, inc.), which motion was overruled and denied by the trial court, and the defendant reserved an exception to the ruling of the court (Rec. p. 40).

Petitioner (defendant) appealed from the judgment against him to the Supreme Court of the State of Alabama, which is the highest court in the State of Alabama in which a decision in a cause can be had, and on June 15th, 1944, an opinion was filed in said cause affirming the judgment of the trial court, holding and deciding that the Jefferson County jury law (Secs. 196 to 228, all inc.), **Title 62, Code of Alabama 1940**, was not repugnant to the Constitution of the United States, evading and refusing to decide the question whether the defendant's constitutional rights and guarantees had been denied or invaded by the trial court, in the absence of the petitioner (defendant) or his counsel, entering the jury assembly room, examining veniremen summonsed for jury service in said cause against defendant, excusing a number of them, and selecting 24 from those present from which a jury was selected before whom the defendant was tried and convicted; and, further, evaded or refused to decide whether or not defendant had been denied his constitutional right, guaranteed under Article XIV of the Amendments to the Consti-

tution of the United States, relative to an impartial jury, fairly selected, as an essential element of due process.

The Supreme Court of Alabama based its decision that the Jefferson County jury law was not repugnant to the Federal Constitution on the decision of the United States Supreme Court, in the case of **Gardner v. State of Michigan,** 199 U. S. 325, 50 Law. Ed. 212, 26 Sup. Ct. 106, and under Section 226, Title 62, Code of Alabama of 1940, that defendant was entitled to only 24 jurors from which to strike a jury, citing the case of **Lizzie Stewart v. State of Alabama.** 17 So. (2d) 871, and he was not entitled to more than 24 jurors from which to strike a jury, citing the case of **Lizzie Stewart v. State of Alabama,** supra, and was not entitled to a special venire which right is accorded to defendants in capital felony cases in all other counties in the State of Alabama.

Counsel for Petitioner has read the record and expresses the opinion that there are substantial questions of constitutional law with reference to a proper construction of the due process clause of the XIVth Amendment to the Federal Constitution, and with reference to the proper construction of the equal rights clause of the XIVth Amendment to the Constitution of the United States, and with reference to the guarantee of a fair and impartial trial contained in the Constitution of the United States, within the guarantee of due process contained in the XIVth Amendment to the Constitution, and with reference to a proper construction of the first clause of Section 4, Article IV, of the Constitution of the United States which guarantees to every state in this Union a Republican Form of Government; each of which said constitutional questions were aptly and properly raised and presented to the trial court and to the Supreme Court of the State of Alabama, except the question with reference to the guarantee of a Republican Form of Government, the infringement of

which could not be anticipated prior to the decision of the Supreme Court of Alabama, affirming the judgment of the court below, and, therefore, could not be presented in the State courts, and that by the decisions of the aforesaid State courts, they have given a construction to such constitutional provisions which are probably untenable.

Counsel for petitioner files herewith printed copy of petitioner's petition for writ of certiorari, along with brief and argument in support thereof, which petition for writ of certiorari is duly sworn to as provided by rules of this court, and at the same time, files a certified copy of the Record in the Supreme Court of Alabama, duly certified by the Clerk of the Supreme Court of Alabama, in strict compliance with the statutes and rules of court in such cases made and provided, and files the same in the Supreme Court of the United States before the expiration of the time provided by law for the filing of petitions for writ of certiorari.

Wherefore, the Above Premises Considered, the Petitioner respectfully moves and prays this court for the following relief:

1. That an order be entered in the above cause permitting the same to proceed to a review in the Supreme Court of the United States upon certiorari, *in forma pauperis*, as is provided by law where the applicant is destitute and without funds to prepare and print the necessary papers in connection with the review.

2. That an order be made and entered, directing and commanding, suspension of the execution of the sentence of death pursuant to the judgment of the Supreme Court of the State of Alabama, pending final decision by the Supreme Court of the United States in this proceeding upon petitioner's petition for a writ of certiorari to the Supreme Court of Alabama.

3. And petitioner moves and prays for such other, further, additional or different relief as this Honorable Court will deem just and meet in the premises considered.

ELBERT J. BURNS,

By .....,
G. ERNEST JONES,
Counsel for Petitioner.

.....,
RODERICK BEDDOW,

.....,
HORACE C. ALFORD,
Birmingham, Alabama,
Of Counsel for Petitioner.

United States of America,
State of Alabama,
Jefferson County. } ss.

Horace C. Alford, being duly sworn, says he is of Counsel for the Petitioner named in the foregoing motion, and in the accompanying petition and brief; that he knows the contents of said motion and petition, and that the things therein stated are true to the best of his knowledge, information and belief.

.....,
HORACE C. ALFORD.

Sworn to and subscribed before me this the 18th day of January, 1945.

.....,
FAY M. THOMPSON,
(Seal) Notary Public.

My Commission as Notary Public Expires March 28, 1948.

IN THE SUPREME COURT OF THE UNITED STATES.

..... Term Number .....

Elbert J. Burns, Alias E. J. Burns, Petitioner,

vs.

The State of Alabama.

State of Alabama,
Montgomery County.

Personally appeared before me the undersigned authority in and for said county and state, Elbert J. Burns, who being duly sworn, on oath deposes and says as follows:

I am 63 years of age and I am a white male citizen and resident of the State of Alabama. I was indicted and charged with the crime of first degree murder, in that it was charged that I murdered one Jake Prescott, the indictment being returned against me by the Grand Jury of the Circuit Court of the Tenth Judicial Circuit of Alabama (Jefferson County) on July 6th, 1943, the date of the death of the said Jake Prescott being alleged to have been on some day between the 16th day of January, 1943, and the 18th day of January, 1943, the said Jake Prescott having disappeared and having later been found dead, his body bearing marks of violence indicating death as a result of a felonious assault and battery.

At the time I was arrested and imprisoned I had no money; owned no property, real, personal or mixed, and had no source of income and I have been incarcerated continuously since the date of my arrest, which said arrest occurred prior to the finding and filing of the indictment

upon which I was tried, which said indictment was filed in open court on the 6th day of July, 1943. I have had no income since my incarceration, save and except trifling sums contributed to me by friends and sympathizers for the purchase of tobacco, food and other small comforts during my incarceration. The reason for these contributions having been made being the humane sympathy manifest toward me by certain friends who had faith in my innocence. My wife owns no property so far as my information goes. She is hostile to my interest, having appeared as a witness for the State against me, and I could expect no contribution from her for my defense if she did own property or had income.

I sincerely believe that I am entitled to the relief for which I am praying in my petition for leave to proceed in forma pauperis and for a stay of execution of sentence pending proper preparation of a writ of certiorari, brief and argument in support thereof, and the record of my cause in the Supreme Court of Alabama. I sincerely believe that my constitutional rights, guaranteed to me by the Federal Constitution were infringed in the several particulars set forth in the motion for leave to proceed in forma pauperis which accompanies this affidavit and which I have read, and particularly that I was denied due process of law; that I was denied the equal protection of the laws and that the arbitrary opinion of the Supreme Court of Alabama and supporting an arbitrary exercise of power contrary to the organic law of the State of Alabama constitutes an abandonment of the Republican Form of Government as guaranteed by the Fourth Article of the Constitution of the United States, and I have been assured by a member of the Bar of the Supreme Court of United States, G. Ernest Jones, Esq., of Birmingham, Ala-

bama, that he will proceed with all diligence to a study of the record in my cause and the authorities of law relating thereto and the preparation of brief and argument in support of petition for a writ of certiorari, and have been assured by him that from a reading of the record in said cause he is inclined to the opinion that my contentions heretofore stated are well founded, and I have been assured by the attorney who tried my case in the Circuit Court of Jefferson County and presented my case to the Supreme Court of Alabama that after his most careful study of the questions herein involved, based upon his complete knowledge of the record of the trial of my case in nisi prius court and in the Supreme Court of Alabama, that he entertains an honest, sincere opinion in good faith that my constitutional guarantees have been infringed by the courts of Alabama as hereinbefore recited.

I sincerely and honestly believe in all good faith that I have not had a fair and impartial trial and I sincerely believe in all good faith that my defense was prejudiced by the refusal of the court below to grant me the privilege of selecting a jury pursuant to the General Law of the State of Alabama, and by reason of the innumerable discretionary rulings made by the court adverse to me where the rulings were not made in the exercise of a fair judicial discretion, but amounted to an abuse of judicial discretion, particularly in the denial to me of the right to have an examination into my sanity pursuant to motion made in that respect and to the submission of the cause upon uncorroborated testimony of an accomplice, contrary to the statutes of the State of Alabama in such cases made and provided, and particularly that hostile and prejudicial comment on the part of the trial judge with regard to whether or not I would be called to testify, which comment

was in violation of the Statutes of the State of Alabama and infringed upon my constitutional guarantee that I should not be compelled to incriminate myself.

.....

Elbert J. Burns.

Sworn to and subscribed before me this 2 day of January, 1945.

.....

Tennyson Dennis,

(Seal) Notary Public.

My commission expires ....., 1946.

I, the undersigned attorney of record in the matter of Elbert J. Burns, alias E. J. Burns, vs. The State of Alabama, do hereby certify that I have served a copy of the above and foregoing motion for leave to proceed in forma pauperis upon Hon. Wm. N. McQueen, Acting Attorney General of the State of Alabama, and Attorney of Record for the State of Alabama, addressed to him at his proper post office address, at Montgomery, Alabama, by United States mail with sufficient postage to pay all mailing charges.

This the ..... day of January, 1945.

.....

G. Ernest Jones,
Counsel for Petitioner.